BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE:	)	
[redacted]	)	
Petitioner	)	
vs.	)	No. 98-34
McNairy County School System,	)	
Respondent.	)	

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
6 Public Square, North
Murfreesboro, Tennessee 37130

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[To protect the confidentiality of the minor student [redacted] will be referred to as "N" on all remaining pages of this decision.]

FINAL ORDER
CASE NO.: 98-34

A Due Process Hearing was requested by counsel, through his parent, [redacted] on behalf of N on July 21, 1998. A Pre Conference Order was issued on August 21, 1998. A Pre Conference Hearing was set for November 12, 1998. A telephone pre-trial conference took place on September 1, 1999 with the Counselor for the Petitioner and the Counsel for the Respondent. The parties agreed to submit proposed findings of fact and conclusions of law regarding the outstanding issue.

I. Findings of Fact

1. Undisputed is the fact the student, N, is an eligible child and a child with a disability within the meaning of both state and federal special education laws.
2. The parents and the school system entered into negotiations during the summer and fall of 1998 to agree to the various issues in the original request for a due process hearing.
3. The Individualized Education Program (IEP) signed on May 11, 1998 provided N with 5 sessions of 45 minutes per week in Math and 5 sessions of 45 minutes each per week in Reading. Also an Ancillary-Attendant would be provided for 35 hours per week.
4. The IEP signed on November 11, 1998 provided for 5 sessions of 45 minutes per week of Math, 5 sessions of 45 minutes per week of Reading, 3 sessions of 30 minutes per week of Speech. The IEP stated that N would receive consultation in Speech,

Transition Specialist and Physical Therapy. Occupational Therapy would be provided 7 hours by the school system.

5. The educational aspects of this Due Process Hearing were settled by the agreed Individualized Education Program (IEP) developed during the meeting of November 11, 1998.

6 Counsel for the school system agreed that the November 11, 1998 "IEP resolved any issue as to placement and program for N and that the results of the IEP is appropriate".

7. Through separate agreement, N will be allowed to serve as football manager.

8. Delay has been caused by the attorneys inability to reach agreement on prevailing party status and attorney fees.

II. Issues

1. Whether the May 11, 1998 IEP would provide a Free Appropriate Pubic Education (FAPE) for N.

2. Is N entitled to the "prevailing party" status due to the additional services added during the November 11, 1998 IEP meeting?

III. Conclusions of Law

This case arises under the Individuals with Disabilities Education Act (the Act), 20 USC 1400 et seq. Under the Act, a student who is eligible for special education because of a disability is to be provided a "free appropriate public education" (FAPE) consisting of special education and related services. 20 USC 1401(a)(18). To this end, the Act

requires that for each disabled student the District develop a curriculum tailored to the unique needs of the disabled child by means of an individualized education program (IEP). Cleveland Heights-University Heights City School District v. Boss, 28 IDELR 32 (6th Cir. 1998) The development and implementation of the IEP are the cornerstones of the Act. Honig v. Doe, 484 US 305, 311, 108 S. Ct. 592, 597-98, 98 L. Ed. 2d 686 (1988).

In the seminal case of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U S. 176 (1982), 102 S. Ct. 3034, 73 L. Ed 2d 690, the United States Supreme Court considered the meaning of the requirement of a "free appropriate public education." Interpreting the provisions of what is now known as the IDEA, the Supreme Court said that a free appropriate public education (FAPE) consists of education instruction specially designed to meet the unique needs of the child with a disability, supported by such services as are necessary to permit the child "to benefit from the instruction." Id. at 188-189.

The test for compliance under the Act is both procedural and substantive: first, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Rowley

Title 20 USC 1415(e)(4)(B) provides: "In an action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents or guardian of a child or youth with a disability who is the **prevailing party**." [emphasis added] At least one circuit has recently reiterated the view that the fee-shifting provision of the IDEA is an important aspect of the Congressional scheme. (Doe v. Board of Educ. of Baltimore County, 165 F.3d 260, 263-64 (4th Cir

1998) (Indisputably, disabled children pursuing IDEA claims merit the very best representation...Loving parents...will, of course, 'fight' for their children... . Precisely because disabled children deserve independent legal services, the IDEA fee-shift provision should be read to encourage parents to obtain independent legal services.)

As under other fee-shifting provisions in the civil rights area, only "prevailing parties" are entitled to an award of attorney's fees. The term "prevailing party" has the same general meaning under 20 USC 1415(e)(4)(B) and 42 USC 1988. Combs v School Bd. of Rockingham County, 15 F3d 357, 360 (4th Cir. 1994), and IDEA permits parents to recover attorney's fees "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit, Hensely v Eckerrhart, 461 U.S. 424, 433, 103 S.Ct. 1993, 76 L.Ed.2d 40 (1983) (quoting Naduea v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir 1978)

A "catalyst test" maybe used to determine whether a plaintiff in an IDEA action has obtained prevailing party status, even though no judicial relief has been secured. This kind of test requires a showing that the underlying litigation (Due Process Hearing) was a catalyst in causing the defendant to take some remedial action. Specifically, the plaintiff must show through evidence that its litigation played a substantial role in the defendant's remedial action. Grinsted v. Houseton County Sch. Dist., 20 IDELR 339 (M.D. Ga. 1993) In order for parents to be a prevailing party, the request for due process must be a "necessary and important factor" in achieving the relief sought. Robinson v. Elida Local Sch. Dist., 24 IDELR 1034 (6th Cir. 1999) The parents do not have to prevail in all issues to be declared the prevailing party. Kari H. v Franklin Spec. Sch. Dist., 26 IDELR 569 (6th Cir. 1997)

A student who requests a Due Process Hearing and then achieves the desired results through settlement was declared the prevailing party even when the underlying action was dismissed. Massachusetts Dept. of Pub Health v. School Comm. 19 IDELR 1031 (D., Mass, 1993). Further the IDEA permits parents to have prevailing party status when the parents successfully settle a case prior to a hearing. Tefefenko ex rel. Terefenko v. Stafford Township Bd. of Educ., 17 EHLR 573 (D.N.J. 1991)

The "but for " test was successfully used in Knox County where the federal court ruled that "but for" the filing of a due process hearing the student would not have been re-evaluated for an appropriate educational setting. Rynes by Rynes v. Knox County Bd. of Educ, 23 IDELR 507 (E.D. Tenn. 1993). When the Due Process decision "clearly altered the status quo by ordering additional Occupational Therapy and speech services for the student", the parents were entitled to be declared the prevailing party. Krichinsky v Knox County Sch., 18 IDELR 1085 (6th Cir. 1992)

One district court has even ruled that successful mediation is a cause for finding a parent to be a "prevailing party". The judge stated, "although no due process hearing or civil action was ever filed to oppose the district's decision, the "threat of litigation" once parents hired an attorney was deemed to be a "material contributing factor in bringing about the desired relief." E. W. ex rel. B.W. v Millville Bd. of Educ., 25 IDELR 809 (D N J 1997)

For plaintiffs to be a "prevailing party" in an IDEA action, they must have secured some relief on the merits of their claim at the administrative level, or through an enforceable judgment, consent decree or settlement agreement Grinsted v. Houston County Sch. Dist., 20 IDELR 339 (M.D. Ga. 1993)

A 1999 case with a similar factual situation to the case at bar stated, that the parent was entitled to "prevailing party" status when she asked for a classroom aide, speech and language services , OT and a behavior plan. The parties entered into a formal settlement and the parent sued for attorney's fees. The Alabama District Court awarded her fees because she had proved there had been a dispute, she asked for a due-process hearing and as a result of the request the board entered into a settlement agreement after negotiations. Doucet v. Childton County Bd. of Educ., 31 IDELR 52 (M.D. Ala. 1999)

A 1999 New York District Court ruled that where a parent retained an attorney who requested a Due Process Hearing but ultimately the case was settled before the Hearing through a series of IEP meetings, the parent was still the prevailing party. The district argued the case should be dismissed based on the IDEA's97 Amendments that provide attorney's fees may not be awarded "relating to any meeting of the IEP team unless such meeting is covered as result of an administrative proceeding or judicial action " The district court noted first that the prevailing party standard has been accorded a broad interpretation by both the U. S. Supreme Court and the 2nd Court of Appeals. Under case law, parents are prevailing parties if they can demonstrate a causal connection between the relief obtain and the litigation in which the prevailing party status is sought The District court concluded that while the 1997 Amendments were clearly intended to discourage attorney participation in routine IEP meetings, the Amendments were not intended " to prohibit completely an award of attorney's fees in cases where the IEP meeting is held to direct response to an attorney's request for an impartial hearing." Moreover, adoption of the school district's position on prevailing party status would frustrate the policy held by the IDEA's attorney fee provision that it be construed liberally

and generously. F.R. and K.R. ex rel. M.R. v. Bd. of Educ., Plainedge Pub. Sch., 31 IDELR 77 (E.D.N.Y. 1999). Allowing an award under the present facts would also prompt attorneys to aid in the prosecution of student rights and encourage early settlements.

IV. Conclusions Applying the Law

The student, N, through his November 11, 1998 IEP has received a free appropriate public education. After the filing of a due process hearing request the school district wisely chose to negotiate a settlement with N and his parent. Through Counsel for the school district's letter of August 5, 1999, it is self evident that the issues of the original due process hearing request have been met. To argue later that the parent could have requested a more favorable IEP does not place the school district in a very good light. The school district had an affirmative obligation in the first place to write a correct and appropriate IEP during the May 11, 1998 meeting. To come along later and agree that additional services were required is an admission that the May 1, 1998 IEP was defective and not appropriate and would not have given N a free appropriate public education.

The school district should be commended for avoiding the hearing phase of a due process hearing and negotiating with the parent. However, how noble that decision may be, it does not dismiss the fact that the May 11, 1998 IEP was inadequate and would not have provided FAPE to N The parent still had to seize the recourse of a Due Process Hearing to bring the inadequacies to the school district's attention.

The settlement of cases through negotiation does not go against public policy but in fact complements and supports the idea of early settlement. The early settlement of

IDEA claims would reduce the time consumed in the hearing phase of Due Process Hearings. When this is accomplished, attorneys for parents should not be penalized by having their status of "prevailing party" ripped from them for attorney fee purposes.

Further, the parent would have had an enforceable agreement "but for" the prevailing party issue. It is clear through letters of the school board attorney written to this Court that a material relationship change had taken place in the writing of the November 11, 1998 IEP. One only has to review the difference between the May 11, 1998 IEP and November 11, 1998 to see that a material change has been made.

V. Order

It appearing to the Court that the parties have reached an agreement to the educational placement and appropriate educational program for N, based on the IEP Team meeting conducted November 11, 1998, subsequent negotiations and the signing of the proposed IEP by the parent and representatives of the school system;

IT IS THEREFORE ORDERED that the IEP resulting from the November 11, 1998 IEP Team meeting is found to be the appropriate placement and program for N.

Further, the parent is the prevailing party in this matter.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED

Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the

entry of Final Order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct this Final Order be stayed.

ENTERED, this the 4th day of February, 2000

Howard W. Wilson 014007
Administrative Law Judge
6 Public Square, North
Murfreesboro, TN 37130

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 4th day of February, 2000, to counsels for the school system, Craig Kennedy, Esquire, P. O. Box 647, Selmer, TN 38375 and John Kitch, Esquire, Suite 305, Hillsboro Pike, Nashville, TN 37212, counsel for the parents; Jack Derryberry, Esquire, Ward, Derryberry & Thompson, Suite 1720, Parkway Towers, 404 James Robertson Parkway, Nashville, TN 37219, and to the Division of Special Education, State Department of Education, Nashville, Tennessee 37243-0375.

Howard W. Wilson